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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1247.

PHILADELPHIA BAR ASSOCIATION

HENRY G. BICKNELL, PLAINTIFF IN ERROR,

vs.

SPRAGUE COMSTOCK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED DECEMBER 19, 1884.

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1 United States Circuit Court for the Eastern District of New York.

SPRAGUE COMSTOCK *against* HENRY G. BICKNELL.

Please to enter my appearance as attorney for the plaintiff in the above-entitled cause, and issue summons to the marshal for service upon the defendant above named, Henry G. Bicknell.

JAMES W. CULVER,
Attorney for Plaintiff.

Dated March 5, 1884.

To the clerk of the circuit court of the United States for the eastern district of New York.

2 [Endorsed:] United States circuit court for the eastern district of New York. Sprague Comstock *vs.* Henry G. Bicknell. Notice of appearance and requisition for summons. J. W. Culver, plaintiff's attorney. Filed the 5th day of March, 1884.

3 United States Circuit Court for the Eastern District of New York.

SPRAGUE COMSTOCK *against* HENRY G. BICKNELL.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff'- attorney within twenty days after the service of this summons, exclusive of the day of service; and in cause of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of Brooklyn, this 5th day of March, in the year one thousand eight hundred and eighty-four.

B. LINCOLN BENEDICT, *Clerk.*
J. W. CULVER,
Plaintiff'- Attorney.

Office and post-office address: No. 170 Broadway, New York city, New York.

4 [Endorsed:] United States circuit court, eastern district of New York. Sprague Comstock *vs.* Henry G. Bicknell. Summons. J. W. Culver, plaintiff'- attorney. To the defendant named within: Take notice that upon default judgment will be taken for the sum of $7,000.00 dollars in money, with interest from March 5th, 1867, besides cost. James W. Culver, plaintiff'- attorney, 170 Broadway, N. Y. city.

5 *Complaint.*

United States Circuit Court, Eastern District of New York.

SPRAGUE COMSTOCK *ag't* HENRY G. BICKNELL. } Action at Law.

For complaint this plaintiff states that he is a citizen and resident of the State of New York, and that said defendant is a citizen and resident of the State of Iowa.

This plaintiff further states, upon his information and belief, that on the 15th day of July, 1867, the defendant made and delivered his certain deed in writing, whereby he granted and conveyed unto one Hiram Bennett lot 3 in section 29, township 92 north, of range 29 west, of the 5 p. m. of Iowa, containing 62 & $\frac{59}{100}$ acres of land, in consideration of the sum of five hundred dollars paid to said defendant by said Bennett, and in and by said deed said defendant covenanted that he was the owner of said premises in fee, clear of all liens and encumbrances thereon, and he warranted said title to said Bennett, his heirs and assigns, against all persons claim-
6 ing the same or any part thereof, as will more fully appear by reference to said deed recorded August 5th, 1867, in Humboldt county, in said State of Iowa, in book B, page 331, for recording deeds.

This plaintiff further states, upon his information and belief, that previous to the execution of said deed by act of Congress, approved July 12th, 1862, the said premises were granted to the State of Iowa (said section being within five miles of the Des Moines river, in the State of Iowa, above Raccoon Fork), and at the time of the execution of said deed said defendant had no title or interest in said premises.

This plaintiff further states that the said Bennett afterwards conveyed said premises to one Alfred Noxon, and by various mesne conveyances the said conveyances have been conveyed to this plaintiff, and he is now the owner of all right, title, and interest which was conveyed by said defendant to said Bennett.

This plaintiff further states, upon his information and belief, that valuable improvements have been made upon said premises
7 by said Bennett and his grantees of the value of six thousand dollars and upwards, and said premises with the improvements thereon would now be worth over $7,000 if the defendant had conveyed a perfect title by his said deed.

This plaintiff further states that, by reason of the want of title in the said Bicknell at the time of the execution of said deed, he has no title to said premises, and has sustained damages to the amount of seven thousand dollars.

Wherefore this plaintiff demands judgment against said defendant for the sum of seven thousand dollars, besides interest and costs.

JAMES W. CULVER,
Att'y for Plaintiff, No. 170 Broadway, N. Y. City.

STATE OF NEW YORK, } ss:
City & County of New York, }

Lyman P. Converse, being duly sworn, says: That on the sixth day of March, 1884, he personally served the within summons and complaint on the within-named defendant, Henry G. Bicknell, by showing the same and delivering to and leaving with him
8 true copies thereof at the city of Brooklyn, N. Y.; that deponent is over twenty-one years of age, and knows the said Bicknell to be the defendant therein named.

LYMAN P. CONVERSE.

Sworn to before me, this 6th day of March, 1884.

JOHN L. N. HUNT,
Notary Public, N. Y. Co.

(Endorsed:) Original complaint. Filed May 7th, 1884.

9 United States Circuit Court, Eastern District of New York.

SPRAGUE COMSTOCK *ag't* HENRY G. BICKNELL. } Action at Law.

For answer to the complaint in this action this defendant denies that said premises were granted by said act of Congress, approved July 12th, 1862, to the State of Iowa; and he also denies the allegation that at the time of the execution of said deed to Bennett this defendant had no title or interest in said premises.

This defendant also denies that the plaintiff has sustained damages for want of title in this defendant when he gave said deed to Bennett.

Second. For a further answer and separate defence this defendant states that on the 23d day of May, 1862, he was a citizen of the United States, of the age of twenty-one years & upwards, and on that day he duly filed in the land office of the United States at Fort Dodge, in the State of Iowa, a declaratory statement, showing
10 that he had settled upon the premises described in the complaint, and claiming the right of pre-emption under the provisions of an act of Congress entitled "An act to appropriate the proceeds of the sale of the public lands, and to grant pre-emption rights," approved September 4th, 1841; that said statement was duly entered upon the records of said land office on May 23d, 1862, and said land was within the district of lands for sale or pre-emption at Fort Dodge aforesaid.

That on the 12th day of June, 1862, a copy of the abstract of said entry of said lands by this defendant, duly certified by the register and receiver of the said land office at Fort Dodge, was duly filed and recorded in the General Land Office of the United States at Washington, D. C.

That this defendant had actually settled upon said lands in May, 1862, before May 23d, and he made the improvements thereon as required by said statute.

That on the fifth day of July, 1867, this defendant duly
11 proved his right to said lands under his settlement of *of* May 23d, 1862, and made and filed all the affidavits to entitle him to a patent for said premises, which were duly approved by the proper land officers of the United States; and on that day he paid to the receiver of the United States at Fort Dodge one dollar and twenty-five cents per acre, as the price of said land, and took his receipt therefor; that, in pursuance of said settlement — proofs of payment, the proper land officers of the United States Government then decided to issue a patent for said land to this defendant; and afterwards, in pursuance of said decision, on the first day of March, 1869, a patent was duly issued to this defendant for said premises, and was duly signed and sealed and recorded in the General Land Office of the United States on the same day, and the said patent was soon afterwards duly transmitted to the land office of the United States at Fort Dodge for this defendant.

This defendant further states, upon his information and belief,
12 that by the said acts the title of said premises related back and became vested in this defendant as of the date of May 23d, 1862, and before the act of Congress approved July 12th, 1862, was enacted.

This defendant further states that by the laws of the State of Iowa the said receipt given July 5th, 1867, showing said lands had been paid for, was evidence of title in this defendant, and, therefore, the conveyance by this defendant to Bennett, July 15th, 1867, conveyed said premises to him in fee and gave him a perfect title thereto.

R. H. SHANNON,
Def'd't's Att'y.

(Endorsed:) Answer. Filed May 7th, 1884.

13 United States Circuit Court, Eastern District of New York.

SPRAGUE COMSTOCK *ag't* HENRY G. BICKNELL.

It is hereby stipulated that a jury trial in this action be, and it is hereby, waived, and the parties consent that the same be tried by this court without a jury.

Dated May 1st, 1884.

JAS W. CULVER,
Att'y for Pl'ff, 170 *Broadway, N. Y.*
R. H. SHANNON,
Def't's Att'y.

(Endorsed:) Consent of waiver of trial by jury. Filed May 8th, 1884.

14 At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the 8th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Charles L. Benedict, district judge, holding the court.

SPRAGUE COMSTOCK *vs.* HENRY G. BICKNELL.

Consent to waive trial by jury filed, and that cause be tried before the court.

Appearances: James W. Culver, for plaintiff; R. H. Shanon, for defendant.

Statement of facts presented to the court.

Cause argued and submitted.

Decision.

Judgment for the plaintiff for $6,000.

July 21st, 1884. C. L. B.

15 At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the 4th day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Present: the Honorable Charles L. Benedict, district judge, holding the court.

SPRAGUE COMSTOCK *vs.* HENRY G BICKNELL.

The parties to the above-entitled cause having consented that said cause be tried by the court without a jury, and said cause having been submitted to the court for decision on an agreed statement of facts and case, and the court having rendered a decision that judgment be entered for the plaintiff for six thousand dollars, and the plaintiff's costs having been taxed at twenty-nine $\frac{20}{100}$ dollars:

Now, on motion of James W. Culver, attorney for the plaintiff, it is ordered, adjudged, and decreed that the plaintiff, Sprague Comstock, recover of the defendant, Henry G. Bicknell, herein the sum of six thousand dollars; found due by the court, and his costs, taxed at twenty-nine $\frac{20}{100}$ dollars, amounting together to the sum of six thousand and twenty-nine $\frac{20}{100}$ dollars, and that execution issue therefor.

By the court. B. LINCOLN BENEDICT, *Clerk.*

16 Endorsed: Judgment roll. Damages, $6,000.00; costs, 29.20; total, $6,029.20. Filed September 4th, 1884.

17 EASTERN DISTRICT OF NEW YORK, *ss:*

Circuit Court of the United States, Eastern District of New York.

SPRAGUE COMSTOCK *ag'st* HENRY G. BICKNELL.

Be it remembered that this case came on for trial at a circuit court held in the United States court-room, in the city of Brooklyn, in said district, May 8th, 1884, before the Hon. Charles L. Benedict, judge, a jury trial having been waived, by consent of parties.

The plaintiff read in evidence a deed from the defendant to Hiram Bennett, dated July 15th, 1867, duly executed and recorded in Humboldt county, Iowa, in book B, page 331, August 5th, 1867, said

deed conveys the premises in question, and also lot 4 in the same section, containing —— acres.

Said deed also contained a covenant as follows: "And the said Henry G. Bicknell does hereby covenant with the said Hiram Bennett, his heirs and assigns, that he, the said Bicknell, is law-
18 fully seized of said premises; that they are free from encumbrances, and that he has good right and lawful authority to sell the same."

It is admitted by the counsel for the respective parties that said lot 3 has been conveyed to the plaintiff in this action by various mesne conveyances from the said Bennett to the said plaintiff before the commencement of this action.

The plaintiff also read in evidence an act of Congress, approved August 8th, 1846, entitled "An act granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river in said Territory;" also a joint resolution of Congress to quiet the title to lands in the State of Iowa, approved March 2d, 1861; also an act of Congress confirming a land claim in the State of Iowa, and for other purposes, approved July 12th, 1862, being chapter 161 of the laws of that year.

Each of the above acts may be read by either party.

The plaintiff also read in evidence a letter from Robert J.
19 Walker, Secretary of the Treasury, in answer to a letter from the Iowa representatives in Congress, of which the following is a copy:

TREASURY DEPARTMENT, *March 2d*, 1849.

GENTLEMEN: I have the honor to acknowledge the receipt of your communication of 8th January last, and accompanying papers, on the construction of the act of Congress "granting lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river, in said Territory," approved 8th August, 1846. I concur with you in the views contained in your communication, and am of the opinion that the grant in question extends, as therein stated, on both sides of the river, from its source to its mouth, but not to lands on the river in the State of Missouri.

I have transmitted your communication and accompanying papers, with a copy of this letter, to the Commissioner of the General Land Office.

I have the honor, &c. R. J. WALKER,
Secretary of Treasury.

Messrs. A. C. DODGE, G. W. JONES, S. LEFFLER, W. THOMPSON.

On the same day the said R. J. Walker, Secretary of the
20 Treasury, addressed an official letter to the Commissioner of the General Land Office, of which the following is a copy:

TREASURY DEPARTMENT, *March 2d*, 1849.

SIR: For your information and government on the subject to which it refers, I enclose a copy of a letter addressed by me under this date to members in both houses of Congress from the State of

Iowa with reference to the construction of the act of 8th August, 1846, granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river. I also enclose a letter, to which the within is a reply, and accompanying papers.

Very respectfully, R. J. WALKER, *Secretary.*

R. M. YOUNG, *Commissioner.*

It is admitted that on the first of June, 1849, the Commissioner of the General Land Office directed the register and receiver at Iowa City to withhold from sale all the lands situated in the odd-numbered sections within five miles on each side of that river
21 above the Raccoon Forks. The survey at that time did not extend further north than township 83 N., 26 W.

The plaintiff also read in evidence the following letters:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *July 26th*, 1851.

SIR: Enclosed I send you a copy of an opinion of the Attorney General, dated the 30th ultimo, in which I concur, relative to the claim of the State of Iowa, under the act of 8th August, 1846, to alternate sections of land along the Des Moines river above Raccoon Forks, together with all the papers in the case.

The order of Mr. Secretary Ewing of the 6th April, 1850, for the withholding of these lands from market until the close of the then session of Congress may be continued to the end of the approaching session, in order to give the State the opportunity of petitioning for an extension of the grant by law.

I am, sir, very respectfully, your obedient servant,

ALEX. H. H. STUART, *Secretary.*

The Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Oct. 29th*, 1851.

22 SIR: I herewith return all the papers in the Des Moines case, which was called from your office about the first of the present month.

I have reconsidered and carefully reviewed my decision of the 26th of July last, and in doing so find that no decision which I can make will be final, as the question involved partakes more of a judicial than an executive character, which must ultimately be determined by the judicial tribunals of the country, and although my own opinion on the true construction of the grant is unchanged, yet in view of the great conflict of opinion among the executive officers of the Government, and also in view of the opinions of several eminents jurists which have been presented to me in favor of the construction contended for by the State, I am willing to recognize the claim of the State, and to approve the selections without prejudice to the rights, if any there be, of other parties, thus leaving the question as to the proper construction of the statute entirely open to the action of the judiciary. You will please, therefore, as soon as may

be practicable, submit for my approval such lists as may have
23 been prepared, and proceed to report for like approval lists of the alternate sections claimed by the State of Iowa above the Raccoon Forks, as far as the surveys have progressed, or may hereafter be completed and returned.

Very respectfully, &c., &c., A. H. H. STUART, *Secretary.*

To the Commissioner of the General Land Office.

It is admitted that on or about the 9th January, 1847, the State of Iowa accepted the said grant under the act of August 8th, 1846.

It is also admitted that on the 9th June, 1854, a contract was made between the Des Moines Navigation and Railroad Company, of the first part, and the State of Iowa, of the second part, whereby, among other things, it was agreed that the said company would improve the Des Moines river from its mouth up to the Raccoon Fork, and in consideration thereof the State would convey to said company the lands acquired under said act of Congress.

It is also admitted that the Indian title to the said section 29 in controversy was not extinguished until April, 1853.

The defendant read in evidence a letter of the president of
24 the Des Moines Valley Railroad Company to the Commissioner of the General Land Office, dated Jan. 9th, 1856, requesting him to withdraw the odd sections within five miles of the Des Moines river, above Raccoon Fork, and the answer of Commissioner Hendricks, dated March 21st, 1856, refusing such request, and deciding that the grant does not extend above the Raccoon Fork.

It is also admitted that on or about April 9th, 1860, the Supreme Court of the United States decided that said act of August 8th, 1846, did not extend above the said Raccoon Fork in the case of Litchfied *vs.* The Dubuque and Pacific Railroad Company, which is reported in 23 Howard's Reports, 66.

The plaintiff read in evidence a letter to the registers and receivers of the United States land office at Des Moines and Fort Dodge, Iowa, of which the following is a copy:

"No. 661. Notice respecting certain lands in the State of Iowa.

"Notice is hereby given that the lands along the Des Moines river in Iowa, within the claimed limits of the Des Moines grant in that
State, above the mouth of the Raccoon Forks of said river,
25 which have been reserved from sale heretofore on account of the claim of the State thereto, will continue reserved for the time being from sale or from location by any species of scrip or warrants, notwithstanding the recent decision of the Supreme Court against the claim.

This action is deemed necessary to afford time for Congress to consider upon memorial, or otherwise, the case of actual *bona fide* settlers, holding under titles from the State, and to make such provision by confirmation or adjustment of the claims of such settlers as may appear to be right and proper.

JOS. S. WILSON,
Commissioner of the General Land Office.

General Land Office, May 18th, 1860.

It is admited that on May 25th, 1860, The Dubuque and Pacific Railroad Company made a claim for a certain portion of the odd sections within five miles of the Des Moines river, in townships 88, 89, and 90, under the grant of Congress of May 15th, 1856, granting certain lands to the State of Iowa for the benefit of said railroad company.

The plaintiff read in evidence a letter dated July 7th, 1860,
26 from the Commissioner of the General Land Office to the Secretary of the Interior in relation to the same subject, in which he said:

"Without passing upon or, in fact, considering the question as to the right of the State under the railroad grant to these lands, which, at the date of the grant, had been withdrawn from sale or location, the fact that Congress has taken incipient action in the matter of itself justifies us in not recommending further proceeding by the Department until after the close of the next session of Congress.

Respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner."

The defendant read in evidence a joint resolution of Congress as follows:

"(No. 11.)

Joint resolution to quiet title to lands in the State of Iowa.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all the title which the United States still retain in the tracts of lands along the Des Moines river, and above the Raccoon Fork thereof, in the State
of Iowa, which have been certified to said State improperly
27 by the Department of the Interior as part of the grant by act of Congress approved August 8th, 1846, and which is now held by *bona fide* purchasers under the State of Iowa, be, and the same is hereby, relinquished to the State of Iowa.

Approved March 2, 1861."

The defendant read in evidence certified copies of sixteen patents issued by the United States in due form and duly recorded as follows:

Date.	Grantee.	Section.	Tp.	R.
1862, Jan. 7.	John Livergood	S. W. ¼ 33,	93,	30.
1863, Nov. 2.	Wm. W. Foster	N. W. ¼ 27,	92,	29.
1866, Jan. 10.	Maria N. Buck	W. ½ N. W. ¼ 9,	93,	30.
1861, June 1.	Wm. Birney	N. E. ¼ 23,	93,	29.
" April 1.	" "	W. ½ S. W. ¼ 35,	93,	29.
1866, Oct. 1.	" "	W. ½ N. W. ¼ 35,	93,	29.
" " "	" "	E. ½ S. W. ¼ 35,	93,	29.
" " "	" "	S. E. ¼ 35,	93,	29.
" " "	" "	S. E. ¼ 33,	93,	29.
1865, Dec. 26.	Wm. Murray, certificate of entry, lots 6 & 8	15,	92,	30.

Date.	Grantee.	Section.	Tp.	R.
1868, Nov. 28.	B. H. Harkness	N. W. ¼ 19,	92,	29.
1866, June 1.	Wm. Murray, certificate of entry, lots 6 & 7	15,	92,	30.
1869, Sept. 1.	Henry Archer	S. E. ¼ 21,	92,	28.
" " "	J. C. Helms	N. W. ¼ 15,	92,	28.

28

1861, June 1.	Lyman Little	N. E. ¼ 31,	93,	30.
1862, Ap. 1.	Chas. MacAlester	E. ½ of S. E. ¼ 31,	93,	30.

It is admitted that the lands described in the above list of patents are situated within five miles of the Des Moines river, in the State of Iowa, north of the Racoon Fork, and such lands were purchased or pre-empted between March 2d, 1861, and July 12th, 1862, and an abstract of each of the declaratory statements filed by the pre-emptors was duly transmitted each month to the General Land Office.

It is admitted that on the 23d May, 1862, Henry G. Bicknell, the defendant, made a settlement upon lots 3 and 4 of said section 29 in question, and on May 24th, 1862, filed in the proper U. S. land office at Fort Dodge, Iowa, a declaratory statement in due form, showing that he had settled upon and pre-empted said lot 3, and also lot 2, in said section (said figure 2 being inserted instead of figure 4 by mistake).

That on the 12th June, 1862, an abstract of said declaratory statement, duly certified, was filed and entered in the General Land Office of the Unted States.

29 The plaintiff read in evidence chapter 161, an act confirming a land claim in the State of Iowa, and for other purposes, approved July 12th, 1862, granting all of the odd sections within five miles of Des Moines river to the State of Iowa, and containing the following proviso:

"And if any of said lands shall have been sold or otherwise disposed of by the United States before the passage of this act, excepting those released by the United States to the grantees of the State of Iowa under the joint resolution of March 2d, 1862, the Secretary of the Interior is hereby directed to set apart an equal amount of lands within said State to be certified in lieu thereof."

It is admitted that the Des Moines Valley Railroad Company succeeded to the rights of the Des Moines Navigation & Railroad Company, and afterwards the Des Moines and Fort Dodge Railroad Company succeed to the rights of the Des Moines Valley Railroad Company as to all lands above Raccoon Fork.

The defendant read in evidence the following letter:

GENERAL LAND OFFICE, *November 12th*, 1862.

30 GENTLEMEN: In reply to your letter of the 28th ult., I have to inform you that the act of July 12th, 1862, extending the grant for the improvement of the Des Moines river by act of August 8th, 1846, makes a grant *in presenti* of all the unsold land at

the date of the passage of the act, (12th July, 1862,) in the odd-numbered sections, within five miles on each side of the river, and makes no provisions for pre-emptions. Therefore, pre-emption settlements made on any of the lands on or after July 12th, 1862, will be invalid, and any entries of such cannot be allowed.

The lateral limits of the grant not having yet been established, I am unable to answer your question as to which fork will be taken.

Very respectfully, your obed't servant,

J. M. EDMUNDS,
Commissioner.

REGISTER & RECEIVER, *Fort Dodge, Iowa.*

The defendant read in evidence an act passed by the eleventh General Assembly of the State of Iowa, entitled "An act providing for the adjustment of certain land claims with the General Government," (said act may be read in full by either party on the
31 argument of this case with the same effect as if herein inserted in full).

The defendant also read in evidence the following official papers:

"WASHINGTON CITY, *May* 21, 1866.

"Pursuant to the authority conferred by the act of the State of Iowa, approved March 30th, 1866, 'for the adjustment of certain land claims with the General Government,' I, Josiah A. Harvey, register of the State land office, and as commissioner on behalf of the State, do hereby assent to the adjustment as herein stated, the said adjustment to be held as binding and conclusive on the said State as provided in said act.

"JOSIAH A. HARVEY,
"*Register of the State Land Office, and Commissioner on behalf of the State of Iowa.*"

WASHINGTON, CITY, D. C., *May* 23, 1866.

To the Honorable CENSUS BOARD of the State of Iowa, Des Moines:

Pursuant to the requirements of chapter 79 of the acts of the 11th General Assembly, I have the honor to report that I
32 have consummated an adjustment with the United States of the excess of lands received by the State under the grant of Sept. 4th, 1841; also, the lands confirmed by the State by the joint resolution of March 2d, 1861, and the lands falling to the State under the act of Congress of July 12th, 1862, and transmit herewith for your approval a copy of the agreement containing the terms of said adjustment.

It will be observed that the State in this settlement is credited with the whole amount of land in odd-numbered sections and lying within five miles of the Des Moines, from the Raccoon Fork to the northern boundary of the State, determined to be 558,004.06 acres.

The State is then charged with the several quantities of land following, to wit:

	Acres.
1st. Indemnity land selected under special certificate, dated April 25th, 1863	297,603.74
2d. Remaining lands in place yet to be certified	167,109.02
3d. Lands in place confirmed by the joint resolution of M'ch 2, '61	44,838.64
4th. Lands selected and heretofore certified, on the east fork of the Des Moines river and more than five miles from the western or main branch	11,661.80
33 5th. The excess selected and approved to the State as a part of the 500,000-acre grant under act of Sept. 4, 1841	35,473.54

Making in all 556,686.74 acres, and leaving due to the State to balance the whole amount of the grant, 1,317.32 acres.

For this balance a special certificate will be issued.

The 11,661.80 acres on the east branch of the Des Moines river, heretofore approved to the State as a part of the Des Moines river grant, and disposed of by the State as such, are held by the Department, under the decision of the Attorney General, to be a legitimate and proper offset to so much of this grant; hence they are charged to the State in this settlement.

The 35,473.54 acres charged in excess under the 500,000-acre grant (act 1841) includes the 22,660.05 acres over and above the 500,000 acres, which is embraced in the book of diagrams approved and certified to the State on the 12th of September, 1854, and which has hitherto been considered as the excess, and also the 12,813.51 acres which were once approved as a part of the 500,000-acre grant,
34 and afterward rejected and approved and certified as a part of the Des Moines river grant.

These lands have been known as the river school lands, notwithstanding they have been disposed of as a part of the Des Moines river lands by the State; said chapter 79 requires that they shall be included and certified as a part of the grant of 1841.

Deeming it my duty to carry out the provisions of the law regardless of my personal opinion as to their correctness or propriety, I have thus included these lands, thereby increasing said excess to 35,473.54 acres, and allowed them to be deducted from the amount of the Des Moines river grant due the State, as the Department had determined.

The necessary and proper lists, according to the terms of this adjustment, will be made and approved by the Secretary and delivered to me or sent to the State.

In the preparation of these lists all lands which appear at the General Land Office as having been selected as swamp under act of September 28th, 1850, and all tracts to which pre-emption
35 rights had attached prior to July 12th, 1862, will be excluded.

If, however, any of the tracts thus listed and certified shall be found to have been duly selected under said act of September 28th, 1850, and shall be shown by legal investigation to be swamp or over-

flowed, or to belong to the State by said act, the Government will approve and certify other lands of like quantity in lieu thereof.

This adjustment, which I think is fair and just and should be satisfactory to the State, will, when approved by you, be a final settlement between the State of Iowa and the United States of all claims under the Des Moines river grant, as well as of the act of 1841, except so far as valid and legally subsisting adverse rights may be found to exist to any of the tracts thus approved to the State.

The excess of the 500,000-acre grant (35,473.54 acres) thus deducted is, by an agreement between the State and the Des Moines Valley Railroad Company (the beneficiary of the grant), to be credited to said company, at the rate of one dollar and twenty-five cents per acre, in the satisfaction of claims against the State on account of the improvement of the Des Moines river.

36 Said company should therefore be credited on the claims they are under obligation to satisfy with the sum of $44,341.67.

My authority extends only to the settlement with the General Government. I have no power to carry out this agreement between the State and the company. It is but just, however, to say that this settlement has been made with the United States with the full understanding that this arrangement should be carried out. The company, through its agents, has for a long time been laboring to this end. The opinion and decisions of the Secretary of the Interior, a copy of which accompan*ying* Mr. Kilbourne's report, made last winter, is herewith transmitted for your examination in connection with this adjustment, *is* the result of their efforts.

The labors of these agents, Messrs. Kilbourne & Mason, heretofore in the premises have greatly relieved me, and enabled me to close up the settlement thus early.

It is due the company that this credit be given as soon as possible.

I hope, therefore, that this entire arrangement will meet with your approbation, and that you will, as I think you have the right

37 and may safely do, fully consummate and carry it out by giving said company the benefit of said credit against said claims without delay.

Very respectfully submitted, J. H. HARVEY,
Commissioner.

Adjustment of the Iowa Des Moines River Grant under the Act of July 12th, 1862, and Joint Resolution of March 2d, 1861.

DEBIT.

	Acres.
The State of Iowa, with the quantity of indemnity lands selected under special certificate dated April 25th, 1863	297,603.74
The lands in place to be certified	167,109.02
The lands in place confirmed by joint resolution of March 2d, 1861	44,838.64

	Acres.
The quantity selected on the East Fork of the Des Moines river, and certified to the State under the original law of August 8th, 1846	11,661.80
The excess selected and approved to the State under the 500,000-acre grant of 1841	35,473.54
	556,686.74
Remaining indemnity due the State	1,317.32
	558,004.06

CREDIT.

The State of Iowa, with the whole area of the grant above the Raccoon Fork	558,004.06

38 General Land Office, May 21, 1866.

J. M. EDMUNDS,
Commissioner General Land Office.

DEPARTMENT OF THE INTERIOR, *May* 22, 1866.

The adjustment as herein stated is hereby approved.

JAMES HARLAN,
Secretary.

THE STATE OF IOWA, *ss:*

The within adjustment, as stated, is hereby approved by us for the State of Iowa.

June 20th, 1866.

W. M. STONE, *Governor,*
JAMES WRIGHT, *Sec'y of State,*
JOHN A. ELLIOTT, *Auditor,*
W. H. HOLMES, *Treasurer,*
Census Board.

It is admitted that on the 14th day of June, 1866, a list of Des Moines river lands in place was approved to the State of Iowa by the Commissioner of the General Land Office under said act of July 12th, 1862, amounting to 167,109.02 acres, which list did not include any part of section 29 in question in this action.

(See report of register of land office of the State of Iowa, Nov. 12, 1867, pages 71 to 84, inclusive.)

39 It is also admitted that a list of lands under said special certificate for 297,603.74 acres, dated April 25th, 1863, was duly approved and certified to the State June 14th, 1866, by the said Commissioner of the Land Office, and another list embracing 1,315.71 acres was duly approved and certified to the State March 13th, 1867.

It is also admitted that none of the said lands in said two lists were within five miles of the Des Moines river.

It is also admitted that the list of lands in place, amounting to 297,603.74 acres, within five miles of the Des Moines river, which were sold or to which pre-emption rights had attached prior to July

12th, 1862, cannot now be found in the proper offices of the United States or State of Iowa.

It is further admitted that on the 5th day of July, 1867, said Henry G. Bickmel made and filed due proof of settlement and improvement on said lots 3 and 4 before C. B. Richards, register of the United States land office at Fort Dodge, Iowa, and also made the affidavit-, of which the following are copies:

LAND OFFICE, FORT DODGE, *July* 5, 1867.

40 Henry R. Botsford and Hiram Bennett, being duly sworn according to law, depose and say: We know that Henry G. Bicknell commenced an improvement on lots 3 and 4 of section 29, town 92 north, range 29 west, on or about the 24th of May, 1862. We know that in the summer of 1862 he built a house and done some breaking. We know that he has five acres broke & under cultivation, and a good comfortable house; know that he has planted out some timber for grove; know that he is residing on the same with his family; know that he is a citizen of the United States, and that he did not move off deeded land to make this pre-emption; consider his improvements on said tract worth at least ——.

HIRAM BENNETT.
H. R. BOTSFORD.

Subscribed & sworn to before me, this 5th day of July, 1867.
C. B. RICHARDS.

Affidavit Required of Pre-emption Claimant.

I, Henry G. Bicknell, claiming the right of pre-emption under the provisions of the act of Congress entitled "An act to appropriate the proceeds of the sale of the public lands, and to grant
41 pre-emption rights," approved September 4th, 1841, to the lots 3 and 4 of section number 29, of township number 92 north, of range number 29 west, subject to sale, at Fort Dodge, do solemnly swear that I have never had the benefit of any right of pre-emption under this act; that I am not the owner of three hundred and twenty acres of land in any State or Territory of the United States, nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit; that I have not directly nor indirectly made any agreement or contract in any way or manner with any person or persons whatsoever by which the title which I may acquire from the Government of the United States should enure in whole or in part to the benefit of any person except myself.

HENRY G. BICKNELL.

I, C. B. Richards, register of the land office at Fort Dodge, do hereby certify that the above affidavit was taken and subscribed before me, this 5th day of July, A. D. 1867.

C. B. RICHARDS, *Register.*

I, Henry G. Bicknell, do solemnly swear that I will support, protect,
and defend the Constitution and Government of the United
42 States against all enemies, whether domestic or foreign, and
that I will bear true faith, allegiance, and loyalty to the same,
any ordinance, resolution, or law of any State, convention, or Legislature to the contrary notwithstanding; and further, that I do this with a full determination, pledge, and purpose, without any mental reservation or evasion whatsoever; and further, that I will well and and faithfully perform the duties which may be required of me by law. So help me God.

HENRY G. BICKNELL. [SEAL.]

LAND OFFICE, FORT DODGE, *ss:*

Sworn and subscribed to before me this 5th day of July, 1867.

C. B. RICHARDS,
Register of the Land Office at Fort Dodge.

It is admitted that the said Henry G. Bicknell, on the 5th day of July, 1867, made payment to the United States receiver for said lots 3 and 4, and thereupon received the certificate, of which the following is a copy:

No. 5304. RECEIVER'S OFFICE AT FORT DODGE, IOWA,
July 5th, 1867.

Received from Henry G. Bicknell, of Humboldt county,
43 Iowa, the sum of one hundred and twenty-seven dollars and
87 cents, being in full for the lots three (3) and four (4) of section No. 29, in township No. 92 north, of range No. 29 west, containing $102\frac{32}{100}$ acres, and 32 hundredths, at $1 25 per acre.

$127.87. CHARLES POMEROY, *Receiver.*

It is admitted that on the first day of May, 1869, a patent in due form was executed by the President of the United States, conveying to said Bicknell said lots 3 and 4, which patent was duly recorded in the General Land Office on the same day at Washington, D. C., and thereupon the original was transmitted to the United States land office at Fort Dodge, Iowa, for said Bicknell.

The plaintiff read in evidence the following official letter, viz:

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 25th*, 1878.

REGISTER AND RECEIVER, *Des Moines, Iowa.*

GENTLEMEN: I am in receipt of your letter of the 17th instant,
enclosing the following patents called for by my letter F of
44 the 11th instant, Nos. 5304, 5305, and 5306, issued May 1, 1869,
upon the following pre-emption cash entries:

Henry G. Bicknell, No. 5304, July 5th, 1867, for lots 3 and 4 of section- 29, 92, 29, on an alleged settlement made May 23d, 1862.

These entries were erroneously allowed at the Fort Dodge office, being on an odd-numbered section within five miles of the Des Moines river and falling within the grant of August 8, 1846, and

July 12, 1862, for the improvement of said river. Accordingly I have this day held the said entries and the patents issued thereon for cancellation.

Advise the parties in interest of this action, and allow 60 days for appeal.

Very respectfully, J. A. WILLIAMSON, *Comm'r.*"

It is admitted that the grantee of said Bicknell appealed to the Secretary of the Interior from said decison last mentioned, but said Secretary affirmed said decision on the 14th day of May, 1879, and directed the Commissioner to cancel said patent, and said Commissioner did thereupon tear off the seals and erase the President's
45 name from said patent, and mutilated the record thereof in the General Land Office, all without the consent and against the protest of the grantees of said Bicknell.

That afterwards the grantee of said Bicknell threatened the Commissioner of the Land Office with mandamus proceedings like the case of McBride ag'nst Schurz, reported 12 Otto, 378, and thereupon the Commissioner delivered up the cancelled patents to the plaintiff grantor, but said Commissioner refused to replace the official seals or expunge the erasures thereon.

It is also admitted that the defendant Bicknell and his grantees have been in actual possession of the premises in question ever since May 23d, 1862, and during that period made permanent improvements upon said lot 3 of the value of more than $6,000.

The defendant, in connection with the railroad grant, &c., and the rights of pre-emptors under the laws of the State of Iowa, refers to chapter 168, act 1872, entitled "An act in relation to land-grant lands and to provide for a record and title thereto," approved
46 April 22d, 1872. See p. 176, 177, Report of Register of Land Office, State of Iowa.

It was also admitted that the Commissioner of the General Land Office on the 3rd day of November, 1879, certified said lots 3 & 4 of said section 29 to the State of Iowa under said act of July 12th, 1862, for the benefit of the Des Moines Valley R. R. Co., the grantee of the State of Iowa.

The foregoing case contains all of the evidence given on said trial.

The court found the facts as admitted and proved as hereinbefore stated to be true.

The defendant's counsel moved to non-suit the plaintiff, or give judgment for the defendant on the grounds:

1st. That the facts proved did not constitute a cause of action.

2d. That the title to the premises in question was vested in the defendant by his settlement and filing his pre-emption claim in May, 1862, and subsequent proofs, payment, and patent.

3rd. That the Harvey settlement, made in 1866, was a full ratification of the defendant's title.

The court refused to non-suit the plaintiff; to which decis-
47 ion the defendant duly excepted.

The defendant's counsel ask the court to decide and find the following conclusions of law, viz:

1st. That the letter or order of the Commissioner of the General Land Office, dated ——, 1856, operated to waive or supersede any previous order, reserving the lands in question from sale or pre-emption.

The court refused so to find; to which refusal the defendant duly excepted.

2d. That the decision of the Supreme Court of the United States in April, 1860, referred to in this case, had the effect to annul or do away with any previous reservation of the lands in question.

The court refused so to find; to which refusal the defendant duly excepted.

3d. That the order of the Commissioner of the [General] Land Office of May 18th, 1860, above set forth, gave such construction to said decision.

The court refused so to find; to which refusal the defendant duly excepted.

4th. That such construction was binding upon the officers of the Government, & the public had a right to rely upon it.

48 The court refused so to find; to which refusal the defendant duly excepted.

5th. That the joint resolution of Congress, approved March 2nd, 1861, had the effect of terminating the reservation by said order of May 18th, 1860.

The court refused so to find; to which refusal the defendant duly excepted.

6th. That said order was only temporary or conditional, to cease upon the passage of said joint resolution.

The court refused so to find; to which refusal the defendant duly excepted.

7th. That the said order was so construed and acted upon by the executive officers of the Government of the U. S.

The court refused so to find; to which refusal the defendant duly excepted.

8th. That the issuing of patents, making sales, and allowing pre-emptions by such officers between M'ch 3d, 1861, and July 12th, 1862, amounted to a waiver of any previous reservation.

The court refused so to decide; to which refusal the defendant duly excepted.

9th. That the pre-emption made by said defendant was valid when made in May, 1862.

49 The court refused so to decide; to which refusal the defendant duly excepted.

10th. That said pre-emption amounted to a disposition of the lot in question within the meaning of the said act of Congress approved July 12th, 1862.

The court refused so to decide; to which refusal the defendant duly excepted.

11th. That the Harvey settlement gave that construction to said act by both governments.

The court refused so to decide; to which refusal the defendant duly excepted.

12th. The State of Iowa having received other lands in place of the lot in question, under that construction, the subsequent act of the said Commissioner in certifying the lot in question to the State was void.

The court refused so to decide; to which refusal the defendant duly excepted.

13th. That under the facts found in this case a perfect title was vested in said Bicknell to the lot in question.

The court refused so to find; to which refusal the defendant duly excepted.

The defendant's counsel asked the court to decide that
50 upon the facts of this case the plaintiff was not entitled to recover.

The court refused so to decide; to which refusal the defendant duly excepted.

After consideration, and on the 21st day of July, 1884, the court directed a judgment for $6,000 damages, besides costs, against the defendant.

To which decision the defendant duly excepted.

And because none of said exceptions appear upon the record the defendant has made and tendered this bill of exceptions, which has been duly settled, signed, and sealed by the Hon. Charles L. Benedict, this 12th day of August, 1884.

CHAS. L. BENEDICT.

We hereby consent to settle the foregoing as the bill of exceptions in this case.

Dated July 30th, 1884.

JAMES W. CULVER,
Att'y for Pl'ff.

R. H. SHANNON,
Att'y for Def't.

51 (Endorsed:) Bill of exceptions. Filed August 14th, 1884.

52 *Bill for Costs.*

Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

SPRAGUE COMSTOCK *vs.* HENRY G. BICKNELL.

Know all men by these presents, that we, Henry G. Bicknell, of Rutland, Iowa, and Lyman Converse, of the city, county, and State of New York, and Robert Hamilton, of Saratoga Springs, N. Y., are held and firmly bound unto the above-named plaintiff, Sprague Comstock, in the sum of two hundred and fifty dollars, to be paid to the said plaintiff; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the second day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas the above-named Bicknell has prosecuted a writ of error

to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named Bicknell shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his complaint good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

H. G. BICKNELL. [L. S.]
L. P. CONVERSE. [L. S.]
R. HAMILTON.

Sealed and delivered, and taken and acknowledged, this fifth day of September, 1884, before me, by Bicknell and Converse.

WM. STAINTON.

53 UNITED STATES OF AMERICA, } ss:
Northern District of New York, County of New York, }

Lyman P. Converse, being duly sworn, doth depose and say: That he is worth the sum of five hundred dollars over and above his just debts and liabilities.

LYMAN P. CONVERSE.

Sworn to this 5th day of September, A. D. 1884, before me.
[L. S.] WM. STAINTON,
Notary Public, New York County, N. Y.

NORTHERN DISTRICT OF NEW YORK, } ss:
Saratoga County, }

On this 6th day of September, 1884, before me personally appeared Robert Hamilton, to me known to be one of the persons described in and who executed the foregoing bond, and thereupon he acknowledged the due execution of the same.

FRANK H. McDONALD,
Notary Public.

I consent to the foregoing bond and the sufficiency of the sureties thereof.

Sept. 6, 1884. JAS. W. CULVER,
Att'y for Pl'ff.

[Endorsed:] Vol. —, page —. U. S. circuit court. Sprague Comstock *vs.* Henry G. Bicknell. Bond for costs on writ of error. E. F. Bullard, att'y. I approve of the within bond. Sept. 16, 1884. Chas. L. Benedict. Filed this 16th day of September, 1884.

54 UNITED STATES OF AMERICA, } ss:
Eastern District of New York, }

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to fifty-three, inclusive, contain a true and complete transcript

of the record and proceedings had in said court in the case of Henry G. Bicknell, plaintiff in error, *versus* Sprague Comstock, defendant in error, as the same remain of record and on file in said office, and that the original writ of error, citation, and assignment of errors are also hereto annexed.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, in the second circuit, this 18th day of December, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the said United States the 109th.

[SEAL.] B. LINCOLN BENEDICT, *Clerk.*

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, before you, between Sprague Comstock, plaintiff, and Henry E. Bicknell, defendant, a manifest error hath happened, to the great damage of the said Bicknell, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the second Monday of October, in the year of our Lord one thousand eight hundred and eighty-three.

B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States,
Eastern District of New York.

Allowed by me September 11, 1884.
CHAS. L. BENEDICT,
U. S. Judge.

56 [Endorsed:] Supreme Court of the U. S. Henry G. Bicknell, pl'ff in error, *vs.* Sprague Comstock, def't in error. Writ of error. E. F. Bullard, att'y for pl'ff in error.

57 By the Honorable Charles L. Benedict, one of the judges of the circuit court of the United States for the eastern district of New York, in the second circuit, to Sprague Comstock, Greeting:

You are hereby cited and admonished to be and appear at a term

of the Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the eastern district of New York, wherein Henry G. Bicknell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand and the seal of this court, at the city of Brooklyn, in the second circuit, the 11th day of September, in the year of our Lord one thousand eight hundred and eighty four, and of the Independence of the United States the one hundredth and ninth.

[SEAL.] CHAS. L. BENEDICT.

58 [Endorsed:] United States Supreme Court. Henry G. Bicknell, pl'ff in error, *vs.* Sprague Comstock, def't in error. Citation. E. F. Bullard, att'y for pl'ff in error. I admit due service of a copy of the within citation this 16 day of Sept., 1884. James W. Culver, att'y def't in error.

59 Supreme Court of the United States. Of October Term, A. D. 1884.

HENRY G. BICKNELL, Pl'ff in Error,
ag't
SPRAGUE COMSOCK, Def't in Error.

And now in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Henry G. Bicknell, by Edward F. Bullard, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, for that it appears by said record that judgment has been given against said Bicknell, whereas by the law of the land said judgment should have been given in favor of said Bicknell, and the court should have decided that a valid title to the premises in question was conveyed to him. And the said Bicknell prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment.

E. F. BULLARD,
Att'y for Pl'ff in Error.

60 [Endorsed:] Supreme Court U. S. Henry G. Bicknell, pl'ff in error, *vs.* Sprague Comstock, def't in error. Assignment of errors & prayer for reversal. E. F. Bullard, pl'ff's att'y.

Endorsed on cover: E. New York C. C. U. S. No. 1247. Henry G. Bicknell, plaintiff in error, *vs.* Sprague Comstock. Filed 19th December, 1884.

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Office Supreme Court U. S.
FILED.
JAN 8 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court U. S.

SUPREME COURT U. S.—October Term, 1884.

HENRY G. BICKNELL,
Plaintiff in Error,
against
SPRAGUE COMSTOCK,
Defendant in Error,

Case No. 1247.

Pl'ff's. Brief.

I,

ABSTRACT OF THE CASE.

This case presents a *new* phase of the litigation arising under the Des Moines river grant by congress of July 12, 1862, which has never been presented to or passed upon by this court.

The questions involved are first: Was the lot in question reserved from sale or pre-emption in May, 1862, when Bicknell made his settlement and filed his claim?

Second—Was that lot excepted from the grant of July 12, 1862?

The following facts bear upon those questions:

In April, 1860, this court decided that the grant of August, 1846, was limited to the Raccoon Fork (Des Moines city), and consequently did not convey to the state any lands north of that place. Page 8.

Dubuque, etc., R. R. v. Litchfield, 23 Howard, p. 66.

In the cases subsequently decided by this court, it was held that sales and settlements made north of that point before April, 1860, were void because the orders of the land department reserving the lands for that grant were *valid*, although the grant did not cover the lands so reserved.

It was conceded by the department that the decision of April, 1860, put an end to such reservation, and therefore a new order was made *May* 18, 1860, withdrawing the odd sections north of the Fork *temporarily*, until congress could give relief to bona fide settlers claiming from the state under that grant. See order, page 8.

March 2, 1861, congress by joint resolution did provide for those settlers, which in effect put an end to the reservation. Page 9.

To show that the order was intended to be temporary and terminate upon the happening of a subsequent event, see letter of the secretary to the committee of the senate, dated June 11, 1860.

The grant of July 12, 1862, expressly excepted all lands sold or "*otherwise disposed of*." Page 10.

The department construed the act as excepting lands pre-empted. See commissioner's letter of November 12, 1862. Page 10.

Also the commissioner made sales, issued patents and allowed pre-emptions after March 2, 1861, and thereby conceded the reservation was not in force after March 2, 1861. Page 7.

In May, 1866, a settlement was made between the United States land office and the state, represented by Harvey, by which a practical constrnction was made of the act of July 12, 1862, that pre-emptions were excepted from the grant, and 297, 602 14-100th acres were given to the state as in demnity for thelands excepted. Pages 11, 12.

That settlement was ratified by the legislature of Iowa May 31, 1868, and by congress, chapter 129, of 1871.

After this, and June 25, 1878, the land department, without any lawful authority, cancelled Bicknell's patents, erased the name of President Grant, tore off the official seals and expunged the records in the land department. Page 16.

Bicknell located the lot in question under the express directions of the United States land office, was permitted by the department to file his pre-emption without dissent under President Lincoln's administration. President Johnson's administration approved of his title, accepted his money, and ordered a patent issued, and the administration of President Grant in May, 1869, issued a patent to him, yet Secretary Schurtz holds he acquired no title, and the court below followed that decision. The grantee of Bicknell sued him for a breach of coverant (page 2) and recovered (page 5) $6,000.

The points submitted are contained in the bill of exceptions at page 17, 18.

The main question presented is, did Bicknell get a good title by his settlement, subsequent proof, payments and patent?

II.

SPECIFICATION OF ERRORS.

The court erred in refusing to decide and find each of the following conclusions of law, as requested at pages 17 and 18 of the case.

1st. That the letter or order of the commissioner of the land office, dated March 21, 1856, operated to waive or supersede any previous order, reserving the lands in question from sale or pre-emption.

2d. That the decision of the Supreme Court of the United States in April, 1860, referred to in this case, had the effect to annul or do away with any previous reservation of the lands in question.

3d. That the order of the commissioner of the general land office of May 18th, 1860, above set forth, gave such construction to said decision.

4th. That such construction was binding upon the officers of the government, and the public had a right to rely upon it.

5th. That the joint resolution of congress, approved March 2d, 1861, had the effect of terminating the reservation by said order of May 18th, 1860.

6th. That said order was only temporary or conditional, to cease upon the passage of said joint resolution.

7th. That the said order was so construed and acted upon by the executive officers of the government of the United States.

8th. That the issuing of patents, making sales, and allowing pre-emptions by such officers between March 3d, 1861, and July 12th, 1862, amounted to a waiver of any previous reservation.

9th. That the pre-emption made by said defendant was valid when made in May, 1862.

10th. That said pre-emption amounted to a disposition

of the lot in question within the meaning of the said act of congress approved July 12th, 1862.

11th. That the Harvey settlement gave that construction to said act by both governments.

12th. The state of Iowa having received other lands in place of the lot in question, under that construction, the subsequent act of the said commissioner in certifying the lot in question to the state was void.

13th. That under the facts found in this case a perfect title was vested in said Bicknell to the lot in question.

14th. That upon the facts of this case the plaintiff was not entitled to recover.

III.

ARGUMENT.

Under the grant of 1846 there was a contest between successive officers of the government as to its northern boundary, which lasted nearly fourteen years.

The secretary conceded it was a judicial question, and he continued to reserve the lands until it should be judicially settled. Page 7.

In *Wolcott* v. *Des Moines Co.*, (5 *Wall.* 681,) decided in 1866, the Court, at page 689, say :

"It was the duty of the executive officers to reserve, and not sell, *till* it was ultimately disposed of."

Therefore, as soon as that question was judicially disposed of, the reservation ceased or terminated. The *purpose* for which the reservation had been made ceased to exist, and the lands were open to settlement.

The constitution authorized congress to "to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United

States." (Art. 4, § 3.) It did not authorize congress to hold lands from settlement forever or indefinitely.

It has been the practice of the executive department to make temporary reservations for a specific *purpose.*

The act approved September 4, 1841, (*U. S. Statutes at large, Vol.* 5, *p.* 455, § 10,) provides: "No lands included in any reservation by any treaty, law, or proclamation of the President of the United States, or reserved for salines or for other purposes," shall be liable to entry, etc.

The decision of this court in April, 1860, as before stated, judicially determined that the grant was limited to the Raccoon Fork. All parties so regarded that decision, otherwise the order of May, 1860, was unnecessary. By its terms it was to continue only for the time being, merely to enable congress to act upon the subject of protecting *bona fide* settlers.

The government is a mere trustee holding the legal title to public lands for the benefit of actual settlers.

"The legal estate is in the Trustee so long as the execution of the Trust requires it, and no longer."

Doe v. Nichols, 1 Barn. & Cres. 336.

The joint resolution of March 2, 1861, fulfilled the purpose for which the reservation was made. This Court so held, in substance, December term, 1872, in *Crilley v. Burrows*, where this language is used:

"This reservation continued until Congress, by the joint resolution of 1861, released to the state for the use of its grantees, the legal title still in the general government."

That case is not reported in full in 17 *Wallace*, 167, but the printed opinion is found in the report of the Register of Iowa to the governor, November, 1873. See page 194 of same.

This concedes that the reservation then terminated by that act.

Commissioner Edmunds of the land office so decided, November 12, 1862; see letter, page 10.

The United States officers so understood it and acted upon that theory when Mr. Richards pointed out section 29 to Mr. Bicknell and allowed him to enter it.

As the order of May 18, 1860, was made by the commissioner of the land office, he could overrule or disregard it. He did so by issuing the patents in 1861 and 1862. (See list, page 9.)

The moment he made one sale, it was evidence to the public that the reservation of May 18, 1860, was to be regarded no longer. If parties could buy, others could preempt. No favoritism is to be allowed. The land office had notice of these pre emptions and made no objections.

The cases cited by the other side are all distinguishable from the case at bar.

Wolcott v. *DesMoines Co.*, (5 *Wallace*, 681,) was decided in 1866. In that case the company gave a deed of a lot to Wolcott in August, 1859, and the act of March 2, 1861, expressly ratified that deed and made Wolcott's title perfect. Therefore his suit to recover against the company for failure of title must fail. All else stated in that opinion was obiter. Although the lot in question in that case was within the limits of the land granted in 1856 to the Dubuque & Sioux City R. R. Co., the latter did not take it under that grant because a proviso in the grant expressly excepted therefrom all lands reserved for any other purpose.

Homestead Co. v. *Valley Railroad* (17 *Wallace*, 153), is relied upon by the defendants.

In that case the plaintiff was not a settler under the pre-emption laws, but claimed under the act of May 15, 1856, granting certain lands to the Dubuque and Sioux

City Railroad Company. The latter act expressly excepted from the grant "all lands heretofore reserved by act of congress, or in any other manner by competent authority."

The court held that the reservation by an order of the land office which was in force in 1856, was such competent authority as to bring them within the proviso, and therefore the act of 1856 did not convey such lands.

That case has no bearing upon land settled upon after March, 1861, and before the act of July 12, 1862.

Williams v. *Baker* (17 *Wallace*, 144), was also a case where Williams claimed under the act of May 15, 1856.

At page 150 the court concede "that unless these lands are excepted out of the grant of 1856 by a proviso in that act, the railroad companies (Dubuque, etc.,) did get the title," etc. But the court cite the proviso, and say that the lands were reserved by competent authority in 1856 within the meaning of that proviso, and therefore were excepted, and no title passed to the state or the railroad companies.

At page 150 the court say: "It is not pretended that any title has been acquired by any other grant or in any other manner."

That is where the case differs from the one at bar. In the latter case the plaintiff did acquire a right by settlement before the act of July 12, 1862.

The executive officers of the government so understood the law, because they made sales and permitted settlements after the decision of the Supreme Court and the act of March, 1861, until July 12, 1862.

The case of *Bellows* v. *Todd* (34 *Iowa*, 19), referred to a lot certified to the state in December, 1849, for the benefit of the railroad company. It was not settled by a pre emption claimant until several years later. The court held that the prior certificate by the land office to the state amounted to a reservation or disposition, and

the United States could not sell it the second time. In the case at bar the lands had not been certified to the state when Bicknell entered, and therefore it is not governed by the Todd case.

That case so far as it was involved is overruled by the *United States ex rel. Mc Bride* v. *Schurz* (12 *Otto*, 378). In the latter case this court expressly held that after a patent was issued and recorded the executive officers had no further control over it and could not recall or cancel it.

The case of the *Dubuque, etc. R. R. Co.* v. *The Des Moines Co.*, decided in June, 1880, by the state court and subsequently affirmed in this court, is like the case of Wolcott above cited. In that case it was admitted that lands were reserved at the time the act of 1856 was passed. That admission alone would defeat the plaintiff in that case, but it has no bearing upon the case at bar.

The statute allowing pre emptions is to be liberally construed in favor of actual settlers.

"The land system of the United States recognizes superior equity of the actual settlers upon the public lands * * * over that of every other person."

Clements v. Warner, 24 Howard, 394.
Terry v. Meyerle, 24 Cal. 609.

In the case of *Mining Co.* v. *Consolidated Mining Co.*, (102 *U. S. p.* 171,) at page 175, the Court says: "A liberal construction must be given to the language by which congress expresses its purpose to protect those settlements, buildings, etc.," * * * "and that we have no right to add other qualifying incidents to the exercise of this right."

The letter of the Commissioner to the Secretary of the Interior, dated July 7, 1860, speaking of the reservation, refuses to issue titles as requested at that date on

the ground "that Congress had taken incipient action in the matter of itself justifies us in not recommending further proceeding by the department until after the close of the next session of Congress."

Rector v. *Gibbon*, (111 *U. S.* 276,) at page 284, the Court says: "Whenever Congress has relieved parties from the consequences of defects in their title, its aim has been to protect those, who in good faith, settled upon the public land and made improvements thereon."

"There was a time, in the earlier periods of the country, when a party who settled in advance of the public surveys was regarded as a trespasser. But all this has been changed within the last half century. With absolute confidence these pioneers have relied upon the justice of their government and they have never been disappointed."

It is evident the court was not aware of the outrage committed by Secretary Schurz in 1879, in cancelling Bicknell's patent, when this opinion was written.

A liberal construction, or any fair construction, would not make this order of May 18, 1860, a reservation in force after the joint resolution of congress March 2d, 1861.

The executive officers under Lincoln, Johnson and Grant were therefore right when by all their official acts with the public they treated the reservation as having expired or being at an end on the passage of the joint resolution on March 2d, 1861, and that Bicknell's settlement in May, 1862, was therefore legal.

"The patent upon a pre-emption settlement takes effect from the time of the settlement, as disclosed in the declaratory statement or proofs of the settler to the register.

Vide Shepley v. Cowen (1 Otto, 337).

"Lands cease to be public when they have been entered at the land office and a certificate of entry has been obtained."

Witherspoon v. Duncan, 4 Wallace, 210.

Page 218: "If subject to sale when the entry is made, the government has no power to revoke the entry and withhold the patent."

9 Howard, 314.
9 Wall, 187.
98 U. S. 118.
Simmirons v. Wagner, 101 E S 260.

The unreported case recently decided by the Supreme Court of Iowa, cited by the other side, does not seem to have considered the points now suggested in regard to the effect of the joint resolution of March 2d, 1861. That court assumed it could have no effect upon the reservation unless so expressed in the resolution, whereas the reservation was contingent, awaiting only for the event, to wit, the action of congress by the passage of said resolution.

The pre emption act says lands reserved for "other purposes." The order said what that purpose was, viz.: to "afford time for congress to consider the case of actual bona fide settlers." When congress acted in 1861 the purpose was accomplished.

The decision cited can therefore have no weight before this court. The lot in question is within five miles of the Des Moines river. See complaint, page 2, folio 6. Which allegation is not denied by the answer.

By the New York Code of Civil Procedure allegations in the complaint not denied by the answer are taken to be true without further proof. By the same code a jury trial may be waived, and the court in its decision shall separately state the conclusions of fact and law as found

by it, and the defeated party may except to such part thereof as he may desire to.

In the case at bar there is no conflict of evidence, and the facts admitted and proved are found to be true. Case, page 17, folio 46.

SECOND.—The settlement and entry by Bicknell in May, 1862, amounted to a disposal of the lands settled upon as against the United States.

The act of congress July 25, 1866, granting lands in California and Oregon, uses this language: "And when any of said alternate sections * * * shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, * * * other lands shall be selected in their place."

Ryan v. R. R. Co., 99 U. S., 386.

Where congress granted lands to a railroad company with a proviso that "all lands not sold or otherwise disposed of by the corporation within three years shall be subject to entry."

Under that act the court held the words "or otherwise disposed of," are not synonymous with sold.

In that case the company did not sell within three years, but gave a mortgage upon the lands granted, the court held that such mortgage amounted to a disposal within the three years, and therefore prevented the government from selling them to other parties or allowing them to be pre-empted.

Platt v. W. P. R. R Co., 99 U. S, 48.

In the mining case 102 United States, 171, before quoted, the court say: "In railroad grants there is most always found a provision that where, by the location of the road, the sections on each side of it, which would pass by the general terms of the grant are ascertained, those which have been pre-empted, sold or otherwise dis-

posed of, shall not pass, but the grantees may select other lands in lieu of them, which may be said in this manner to be excepted out of the grant."

THIRD.—The lands settled upon by Bicknell in May, 1862, by such construction were excepted from the grant of July 12, 1862. See that grant, case, page 10, folio 29. That was the uniform construction given to the grant by the officers of both governments, and by the public and all parties interested from 1862 till 1878 (about 15 years), when the wise man, Secretary Schurz, discovered that the railroad company, as grantee of the state, could defraud the actual settlers of their lands. (This same man a few years later made a speech before the Phi Beta Kappa Society of Harvard College against the dangers of railroad monopolies.)

FOURTH.—By express agreement between the two governments, the act of July 12, 1862, was construed so as to except from the grant all lands pre-empted, including the lot in question.

The legislature of Iowa, being the eleventh general assembly, passed "an act providing for the adjustment of certain land claims with the general government," approved March 30, 1866. (It was read in evidence on this trial, see case, page 11.) The following extracts from said statute are such as are deemed necessary to the decision of this case:

"WHEREAS, The lands falling to the state under the joint resolutions of congress of March 3d, 1861, entitled 'joint resolutions to quiet titles in the state of Iowa,' and under the act of congress entitled 'an act confirming a land claim in the state of Iowa, and for other purposes,' approved July 1862, have not yet been certified or approved to the state; and

"WHEREAS, The claims of the state against the United States, arising under the swamp land grant, remain to a

very great extent in an unsettled and unsatisfactory condition; and

"WHEREAS, The interests of the state and her grantees demand a speedy settlement of all said matters; therefore,

"Section 1. Be it enacted by the general assembly of the state of Iowa that Josiah A. Harvey, register of the state land office, be and he is hereby appointed a commissioner on behalf of the state of Iowa, to adjust with the general government all the matters and claims aforesaid.

"Sec. 2. Said commissioner shall proceed to Washington city and present said claims to the department of the interior, and urge the same to settlement as early and as speedily as may be consistent with the interests of the state. * * *

"Sec. 3. As soon as the claim or claims, or matters of difference under any one of said acts shall be adjusted, said commissioner shall report the same to the census board, setting forth the terms and mode of adjustment, and said board shall examine and pass upon said adjustment, so presented, and the approval of a majority of said board shall make the settlement of said matters or claims final and binding upon the state of Iowa."

The settlement made by Harvey under that statute is dated May 21, 1866, and will be found on pages 11, folio 31, and page 13, folio 37, and page 14 to folio 38, and approved by the secretary of the interior May 22, 1866. Page 14, case.

Harvey's report of the same is dated May 23, 1866. Page 11 of case.

By this settlement it will be seen that the railroad company was also represented by Kilbourn and Mason. Case, page 13.

It is evident that the state and railroad company preferred to get as large a number of acres for indemnity

as possible, and for that purpose would be sure to make the list of lands sold, pre-empted or otherwise disposed of as large as possible, as they would receive indemnity to an equal amount.

It will be seen by this settlement that the state is credited with the whole area of the grant above the Raccoon Fork, 558,004 acres, and they are charged with only 167,109 acres in place, pages 11 and 12 of case, and they received indemnity to the amount of 297,603 acres for lands, none of which were within five miles of the Des Moines river, case, page 14, folio 39. By this settlement all tracts to which pre emption rights had attached prior to July 12, 1862, were excluded. See case, page 12, folios 34 and 35.

The only lands within the five miles allowed to the state were 167,109 acres, case, page 12, which did not include any part of section 29 in question in this action. See case, page 14, folio 38.

This settlement was approved by the census board of Iowa June 20, 1866. Case, page 14.

All parties now regarded this unfortunate conflict at an end, and hence the government could with propriety call upon the settlers to pay for their land, which Bicknell did July 5, 1867. See case, page 16, folio 43.

To make this settlement doubly sure, by the laws of Iowa, chapter 57, approved March 31, 1868, it was expressly ratified and confirmed by the fifth section of said act, of which the following is an extract:

"And the settlement made and approved June 20, 1866, by the census board of the state of Iowa with the Des Moines Valley Railroad Company, and the settlement with the United States therein referred to, are hereby ratified and confirmed."

The preamble of that act recited that the said railroad company was in default, whereby the state had a right to resume the whole or a part of said lands, but section

one extended the time for the railroad company to perform.

It is therefore now unconscionable for said company to attempt to defraud the bona fide settlers, especially after they have received indemnity lands to the full amount.

The effect of this settlement came up before the department of the interior in May, 1868, in the case of Herbert Battin.

The opinion of that able jurist, O. H. Browning, secretary of the interior, dated May 9, 1868, among other things, states "that Battin claimed a pre-emption right to the southwest quarter of section 3, town 83, range 27, Iowa."

That the attorney of the Des Moines Navigation and Railroad Company in a very elaborate brief, contends that under the grant of 1846 this land was withdrawn, and that the original decision of the court could not operate to restore it.

He refers to the instructions issued by the commissioner of the general land office of June 1st, 1849, to the register and receiver at Iowa City, Iowa, for evidence of withdrawal. Upon looking at these instructions it is found that the withdrawal only extended up to township 83 north, range 26 west, that being as far as the public surveys had progressed in that direction.

This tract is, consequently, not within the limits of "*that withdrawal.*"

"The act approved July 12th, 1862, makes a new grant to the state of those lands above the Raccoon Fork, except those which have been sold or otherwise disposed of, for which indemnity is given."

In view of this legislation it became necessary to ascertain what indemnity, if any, was due the state. The decision then recites the Harvey settlement of May 21, 1866, printed in the case, as before stated. It further

states "that the state by the deliberate and recorded admission of her authorized agents, has thus received all the lands to which she was entitled on account of the improvement of said river.

"The adjustment is conclusive and final. As the state received indemnity for this identical tract, her claims on behalf of the Des Moines company must be rejected without regard to adverse claims."

This decision of the Secretary of the Interior also cites the decision of this Court in the case of *Wolcott* v. *The Des Moines Company*, (5 *Wallace*, 681,) and then adds: "At the date of that decision (Dec. 1866) the Des Moines River grant had been finally adjudicated. The state had, as before remarked, received all the land to which she was entitled on account thereof, and she is thus estopped from setting up a claim. Although this fact does not appear in the record of the case, I have shown that it is incontrovertibly established by the records of your office. It is the duty of the department in administering the acts of congress to give full effect to the settlement, otherwise the state would first obtain, in lieu of lands she alleged had been "otherwise disposed of," an indemnity amounting to an equal quantity of such lands, and then when her right to land selected by way of indemnity had been recognized and confirmed to her, she could assert her title to the lands she alleged had been disposed of. The effect of this would give her more than she originally claimed.

The effect of that decision is, therefore, only to exclude from the railroad grant lands lying north of the Fork, and to restore them to the public domain, at least so far as to subject them to the operation of the preemption and homestead laws."

The above decision of the Secretary of the Interior is found printed in full in the report of the Register of the

State Land Office to the Governor of Iowa, November, 10, 1869, beginning at page 15.

THE HARVEY SETTLEMENT APPROVED BY CONGRESS.

The act of Congress approved March 3, 1871, chapter 129, recites the Harvey settlement and recites the act of the State of Iowa ratifying the same, approved March 31, 1868, and it now ratifies the same: "Provided that nothing in this act shall be so construed as to affect adversely any existing legal rights or the rights of any party claiming title or the right to acquire title to any part of said lands under the provisions of the of the so called homestead or pre-emption laws of the United States."

16 U. S. Statutes at Large, 582.

The effect of this act so far as the state and its grantees were concerned, was to confirm its title to the 297,603.-74 acres certified to the state outside of the five mile limit, for indemnity land, given in place of the lot in question, but it expressly protected the rights of Bicknell.

"In cases of doubt, a legislative grant should always be construed most strongly against the grantee."

Slidell v. Grandjean, 111 U. S 412

"Claimants against the government under legislative grants of public land must show a clear title, as gifts of public domain are never to be presumed."

Rice v. Sioux City, etc., R. R. 110 U. S. 695

The act of Congress, 1876, chapter 72, also in effect confirms Bicknell's title.

19 U. S. Statutes at Large, p. 35.

It has been the uniform practice of the department to regard land occupied by pre-emption claimants, as dis-

posed of so as not to pass by subsequent railroad grants. (Letter of Com. Wilson, dated September 3, 1867, in State Register Report of 1867, page 63.)

Johnson v. Towsley, 13 Wallace, 72.
Newhall v. Sanger, 91 U. S. 761.

The fact that the State made contracts in 1854 and 1858 to transfer the lands to the railroad company at a future date, provided the railroad company complied with certain conditions, could only operate upon land then owned by the state, and titles subsequently acquired by the state, under the act of July 12, 1862, would not enure to the railroad company.

Leavenworth, etc. R. R. v. United States, 92 U. S. 733.

Said contracts of the State would be in effect only a quit-claim deed without covenants.

FOURTH.—The pre-emption settlement of Bicknell being valid and on record before July 12, 1862, the land embraced in it was excepted from the grant to the State.

If Bicknell was afterwards in fault or by any laches lost or forfeited his rights, the title would fall back to the United States government, and could be resold by it. His subsequent payment and patent gave him a perfect title.

The decision of the land office in 1867 approving of the proofs of Bicknell and the payment by him to the government and the issuing of the patent in 1869, are conclusive evidence as to the date and regularity of his settlement and improvement. (See Case, pages 15 and 16.

Vance v. Burbank, 101 U. S 514.

FIFTH.—The act of the Commissioner certifying section 29 to the State, was void because the same was excepted from the grant of July 12, 1862.

U. S R. S. page 451, § 2449.
Code of Iowa, § 93.

The act of the Commissioner in cancelling Bicknell's patent was absolutely void.

McBride v. Schurz. 12 Otto, 378

As the Secretary had no right to cancel the patent, that objection was taken before him and he refused to hear any oral argument on the merits. So that the facts now in evidence were not considered by him.

It is evident Judge Benedict did not distinguish this case from the former cases decided by this court, as he wrote no opinion.

Both justice and equity reqnire this Court to reverse the judgment of the Court below.

Respectfully submitted,

EDWARD F. BULLARD,

Counsel for Plaintiff in error.

I admit service of a copy of the above points, and consent that the case be submitted upon printed argument orthwith. January 5, 1885.

A. B. OLMSTEAD,

Attorney for Defendant in error.

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Supreme Court

OF THE

UNITED STATES,

OCTOBER TERM 1884. *No. 1247.*

HENRY G. BICKNELL,
Plaintiff in error,
vs.
SPRAGUE COMSTOCK,
Defendant in error.

DEFENDANT'S BRIEF.

Although the questions presented in this case have never been directly passed upon by this court, yet we contend that they have been substantially decided in the cases below cited:

See Wolcott *v.* Des Moines Navigation Co., decided December Term, 1866. 5th Wallace, 681.

Riley *v.* Wells, decided December Term, 1869.

Baker *v.* Williams, 17th Wallace, 144.

Homestead Co. *v.* D. M. Valley R. R. Co., 17 Wallace, 153.

Dubuque & S. C. R. R. Co., *v.* D. M. V. R. R. Co., 54 Iowa, 89. Recently affirmed by this court.

Bellows *v.* Todd, 34 Iowa, 19.

Case recently decided by the Supreme Court of Iowa not reported, involving a construction of the letter of the Commissioner of the General Land Office, dated May 18, 1860, and the joint resolution of Congress, approved March 2, 1861. The court used the following language:

"The only effect of this resolution was to confirm "all titles, which were derived from the state, to "lands which had been wrongly certified to it. There "is nothing in the resolution which directly, or by "implication, conveys the thought that the action "of the land departments reserving the lands from "sale or pre-emption was superseded thereby, and we "cannot think Crilly *v.* Burrows so holds, but that it "has reference to lands, the title to which was other "and different from those in controversy."

We contend that the reservation of May 18, 1860, could only be removed by a general order from the Land Department, or by a direct action of Congress. The case of Crilly *v.* Burrows only decided that the reservation "continued until Congress, by the joint resolution of 1861," made the release of such lands as had been sold by the state to *bona fide* settlers. We contend that it did not affect the reservation as to other lands.

The Harvey settlement made in May, 1866, could not affect the rights of the state which had been acquired prior to that event.

In 1858 the state made a contract to convey all the lands it had received from Congress to a railroad company; and we claim that such a contract became a vested right prior to the Harvey settlement.

We submit, therefore, that Bicknell had no title when he conveyed the lands in question, and the judgment below should be affirmed with costs.

A. B. OLMSTEAD,
Attorney for Defendant in error.

I admit service of a copy of the points, and consent that the case be submitted on printed argument forthwith.

January 5, 1885.

E. F. BULLARD,
Attorney for Plaintiff in error.